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No. 98-1211

In the Supreme Court of the United States

OCTOBER TERM, 1998

KANOWITZ FRUIT AND PRODUCE CO., INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture acted arbitrarily and capriciously in revoking petitioner's license as a dealer in perishable agricultural commodities, rather than imposing a fine, as the sanction for petitioner's repeated late payment of suppliers.

2. Whether the Secretary, in making his decision on the level of sanctions to apply to petitioner, was required to consider certain additional factors.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

ABL Produce, Inc. v. *United States Dep't of Agric.*, 25 F.3d 641 (8th Cir. 1994)	9, 10, 11
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	7
Butz v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973)	7
Conforti v. *United States*, 74 F.3d 838 (8th Cir.), cert. denied, 519 U.S. 807 (1996)	9, 10, 11
Harry Klein Produce Corp. v. *United States Dep't of Agric.*, 831 F.2d 403 (2d Cir. 1987)	5
Havana Potatoes of New York Corp. v. *United States*, 136 F.3d 89 (2d Cir. 1997)	5

Statutes and regulations:

Packers and Stockyards Act, 1921, 7 U.S.C. 181 *et seq.*	7
Perishable Agricultural Commodities Act, 7 U.S.C. 499a-499s (1994 & Supp. III 1997)	2
7 U.S.C. 499b(4)	2
7 U.S.C. 499c (1994 & Supp. III 1997)	2
7 U.S.C. 499h(a)	2
7 U.S.C. 499h(b)(1)	9
7 U.S.C. 499h(b)(3)	9
7 U.S.C. 499h(e) (Supp. III 1997)	2

Regulations—Continued: Page

7 C.F.R.:
Section 46.2(aa)(5) 2
Section 46.2(aa)(11) 2

Miscellaneous:

S. Rep. No. 2507, 84th Cong., 2d Sess. (1956) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 166 F.3d 1200 (Table). The opinions of the Judicial Officer of the Department of Agriculture (Pet. App. 7a-31a, 32a-71a) and of the administrative law judge (Pet. App. 72a-83a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1998. The petition for a writ of certiorari was filed on January 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1930, Congress enacted the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499a-499s (1994 & Supp. III 1997). That law sought to prevent unfair and fraudulent practices in the perishable products industry against the producers of perishable agricultural products, who routinely must ship their goods to dealers thousands of miles away and who are unusually vulnerable to abuses by dealers. See S. Rep. No. 2507, 84th Cong., 2d Sess. 3 (1956). PACA requires a dealer in perishable agricultural commodities to obtain a license from the Secretary of Agriculture. See 7 U.S.C. 499c (1994 & Supp. III 1997). The Act then makes it unlawful for a licensed dealer "to fail * * * [to] make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. 499b(4). Pertinent Agriculture regulations define "full payment promptly" as "[p]ayment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted," unless the parties "elect to use different times of payment," in which case they "must reduce their agreement to writing before entering into the transaction." 7 C.F.R. 46.2(aa)(5) and (11).

If a dealer violates those provisions, the Secretary may suspend its license; if the violation is "flagrant or repeated," the Secretary may entirely revoke the license. See 7 U.S.C. 499h(a). As an alternative to suspension or revocation, the Secretary may instead assess a civil penalty of up to $2000 "for each violative transaction or each day the violation continues." 7 U.S.C. 499h(e) (Supp. III 1997).

2. Petitioner is a fruit and produce dealer located at the Brooklyn Terminal Market in Brooklyn, New York. Pet. App. 37a. After an investigation, the Secretary filed an administrative complaint against petitioner in 1994, alleging that from February through November 1993, petitioner had failed to make full payment promptly to 18 sellers of produce, and that as of the date of the complaint it owed those sellers $206,850.60 for unpaid and past-due payments. *Id.* at 2a. Petitioner contended that the sellers had agreed to the late payments, and that it had delayed making the payments because of financial difficulties that were caused by what petitioner said was the theft of $300,000 to $400,000 of its inventory by employees. The police found insufficient evidence of the thefts to warrant prosecution. *Id.* at 2a, 37a.

In 1996, the Secretary inspected petitioner's records and then filed an amended complaint alleging that, although petitioner had by then paid the earlier past-due amounts that were up to two years late, petitioner had incurred new past-due debts for its produce purchases between January 1994 and January 1996 in an amount totaling $195,495.10. By the time of the hearing before an administrative law judge (ALJ), petitioner showed that it had paid off those amounts as well, but the ALJ found that petitioner now owed approximately $125,000 for produce that it had accepted since the filing of the amended complaint. Pet. App. 2a-3a. The ALJ found that petitioner had been rolling over its debt, that is, paying off its existing debt by delaying payment for later shipments of produce. *Id.* at 3a. The ALJ concluded that petitioner had no written agreements with any sellers to extend the payment terms. *Id.* at 76a. Accordingly, the ALJ found that revocation of petitioner's license was the proper sanc-

tion because petitioner's violations of the prompt payment requirements of the statute and regulations were repeated, flagrant, and willful. See *id.* at 3a, 42a-43a, 79a- 80a.

Petitioner appealed to the Department of Agriculture's Judicial Officer, but the Judicial Officer adopted the ALJ's decision as the final decision of the Secretary, after making minor changes in the ALJ's opinion and adding extensive discussion of his own. See Pet. App. 32a-71a. The Judicial Officer rejected petitioner's defenses, including its argument that mitigating circumstances make revocation of its license too harsh a penalty. The Judicial Officer explained that "because of the peculiar nature of the perishable agricultural commodities industry, and the congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time." *Id.* at 59a.

Petitioner sought reconsideration, but the Judicial Officer denied the petition with another lengthy opinion. Pet. App. 7a-31a. The Judicial Officer noted that "the revocation order in this proceeding is not being issued for any punitive reasons. * * * There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that paid produce sellers from 2 weeks to 117 weeks late in violation of the PACA." *Id.* at 18a. The Judicial Officer granted petitioner's request for a stay

of the license revocation pending judicial review. *Id.* at 4a.*

3. Petitioner sought judicial review of the Secretary's final decision in the court of appeals, but that court denied the petition and directed enforcement of the revocation order. Pet. App. 1a-6a. Noting that PACA is "an intentionally rigorous law," *id.* at 4a (quoting *Harry Klein Produce Corp.* v. *United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987)), the court of appeals concluded that the factual findings are supported by substantial evidence; the findings of petitioner's violations as flagrant and repeated are not an abuse of discretion; and the regulations' strict definition of prompt payment, which requires that agreements by suppliers to longer payment terms must be in writing, are not arbitrary, capricious, or contrary to the statute. *Id.* at 5a. The court rejected petitioner's argument that there are mitigating factors, such as embezzlement by its employees, that make license revocation unfair, concluding that "financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds." *Id.* at 6a (quoting *Havana Potatoes of New York Corp.* v. *United States*, 136 F.3d 89, 94 (2d Cir. 1997)).

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* While the stay apparently expired when the court of appeals issued its mandate, the Department of Agriculture informs us that it will not enforce the revocation of petitioner's license until this Court finally disposes of this petition.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other circuit. Review by this Court is therefore not warranted.

1. As the court of appeals, the Judicial Officer, and the administrative law judge (ALJ) each explained, the Perishable Agricultural Commodities Act (PACA) imposes unusually strict requirements on dealers, based upon the distinctive nature of the interstate trade in fruits and vegetables. A producer of perishable produce must contract with and ship to dealers very quickly to enable the produce to reach consumers before spoiling. For the same reason, the dealer in turn must quickly arrange for further transshipment of fresh produce to the places of ultimate sale to consumers. Thus, because the producer's goods have already been resold by the dealer, the producer has reduced recourse against a dealer who does not make quick payment to the producer. Because of that characteristic of the perishable commodities market, Congress established a strict licensing scheme for perishable produce dealers and the Secretary adopted regulations requiring payment to be made either within 10 days of shipment or, if later, under the terms of a pre-existing written agreement. Petitioner argues for leniency based upon what it alleges to be informal industry practice, but the Act and its regulations do not recognize such informal exceptions to the strict rule of prompt payment.

2. Petitioner does not dispute that its actions violated the statute and regulations. Rather, petitioner appears to dispute only the severity of the sanction imposed upon it—revocation of its license. Pet. 14. Indeed, petitioner does not even appear to dispute that its violations were repeated and intentional, ranging

over a period of more than three years. According to several inspections of petitioner's records, petitioner delayed payment on hundreds of lots of produce to dozens of sellers, constantly maintained overdue debt that ranged between $125,000 and more than $200,000, and failed to obtain any written agreements with sellers that would have permitted those late payments to comply with applicable regulations. Consequently, petitioner agrees that the Secretary properly could impose at least some sanction on it. *Ibid.*

Petitioner argues, however, that the Secretary acted arbitrarily and capriciously in revoking its license, instead of imposing a fine. Pet. 9-12. That issue does not merit this Court's review. As this Court explained in the closely-related context of the Packers and Stockyards Act, 1921, 7 U.S.C. 181 *et seq.*, the Secretary's choice of sanction for a violation of a statutory standard "is peculiarly a matter for administrative competence." *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946)). Petitioner essentially asks this Court to re-examine the exercise of discretion by the ALJ in making the initial decision and by the Judicial Officer in reviewing and adopting it—an exercise of discretion that was reviewed and upheld by the court of appeals under the applicable statutory standards.

Indeed, petitioner's principal argument (Pet. 9-10) is that the Secretary erred as to only one narrow matter: placing no significance on petitioner's having obtained approval of a Small Business Administration (SBA) loan in the amount of $250,000, which petitioner alleges would have enabled it to become current on past-due accounts and to pay a fine. Because the loan was conditional on petitioner's retaining its license, petitioner

argues that if the Secretary had only imposed a fine, it could remain in business and finally overcome the ongoing effects of its employees' past embezzlement. The Judicial Officer rejected that argument, concluding that a financing arrangement such as petitioner's SBA loan "is not payment in accordance with the PACA and is therefore not relevant to the issue of the existence of [petitioner's] roll-over debt." Pet. App. 15a.

That decision is not arbitrary or capricious. Although in ordinary commercial relations it might be acceptable for a dealer in financial difficulty to obtain a loan enabling repayment of overdue debts to suppliers, PACA does not tolerate such practices. The statute is not simply a scheme to assure that suppliers are eventually paid. Rather, it requires immediate payment of suppliers, or a formal agreement in advance to delay payment, in recognition of the special circumstances of interstate trade in perishable produce. The Act thus authorizes revocation of the license of any perishable commodities dealer who, like petitioner, repeatedly and intentionally fails to make timely payments to its suppliers. The Secretary was therefore entitled to disregard petitioner's last-minute efforts to deal with its persistent practice of rolling over its debts, since petitioner engaged in that illegal practice so consistently for more than three years.

3. Petitioner next argues (Pet. 12-19) that the court of appeals erred by failing to apply a "relevant factors" test, pursuant to which petitioner asserts that a reviewing court may reduce the severity of the penalty after considering three criteria: whether the licensee's actions threatened to undermine the purposes of the Act, whether any mitigating circumstances excuse the violation, and whether the sanction imposed would have

an unduly harsh effect on the company. Petitioner is mistaken in seeking to apply those factors in this case.

a. Petitioner asserts (Pet. 12-13) that the Eighth Circuit has adopted a "relevant factors" test in two cases, and thus that the decision below conflicts with those decisions. That contention is without merit. The Eighth Circuit cases upon which petitioner relies concern violation of a different provision of PACA from the one at issue in this case. The severity of the respective violations in the Eighth Circuit cases is not comparable to the repeated and flagrant violations committed by petitioner in this case. Both Eighth Circuit cases, *Conforti* v. *United States*, 74 F.3d 838, cert. denied, 519 U.S. 807 (1996), and *ABL Produce, Inc.* v. *United States Department of Agriculture*, 25 F.3d 641 (1994), involved a provision of PACA that prohibits a licensee from employing any person who is or has been "responsibly connected" with any other company whose license has been revoked or is currently suspended, or which has outstanding reparation orders. 7 U.S.C. 499h(b)(1) and (3). In each case, an ALJ had imposed a 30-day suspension on a licensee for employing such a responsibly-connected person, the Judicial Officer had imposed a harsher sanction, and the court of appeals reinstated the ALJ's original 30-day suspension, citing certain mitigating circumstances. Those decisions reflect what the court there held to be less serious violations of PACA. The Eighth Circuit reasoned that the employment by a licensee of a person who was involved with another company that violated the Act, while a serious matter, does not directly involve the Act's core purpose of reducing the risk of non-payment of produce suppliers. See *Conforti*, 74 F.3d at 842; *ABL*, 25 F.3d at 646. The Eighth Circuit justified its more searching review by contrasting the

PACA violations in those cases with a licensee's failure to make timely payments. See *ibid.* The Eighth Circuit's own rationale thus makes its decisions inapplicable to the present case.

Moreover, the Eighth Circuit also relied on other factors that distinguish those cases from this one. In *ABL*, the court of appeals noted that the licensee had made good faith efforts to prevent the banned person from routinely taking orders or otherwise handling its business. See 25 F.3d at 646. In *Conforti*, the court explained that the banned person was only a "front man" who lacked actual authority or an interest in the licensee. See 74 F.3d at 842. Those cases thus do not resemble the present case, in which the licensee itself violated the affirmative provisions of the Act by persistently and intentionally making late payments over several years. Petitioner's claim of a "conflict," therefore, is unpersuasive.

b. In any event, even if the three "relevant factors" that petitioner cites should be assessed in a decision whether to revoke a license for failure to make timely payments, a proper application of that test would not cast doubt on the Secretary's decision to revoke petitioner's license. Petitioner first argues (Pet. 13) that revocation of its license undermines the purposes of PACA because the Act seeks to assure that produce dealers are financially responsible, and its SBA loan arrangement would have saved the company and made it sound, rather than make it bankrupt and thus unable to pay its debts in full. That argument is not persuasive because, as the administrative decisions and the court of appeals' opinion stressed, the actual purpose of PACA is not simply to secure eventual payment of suppliers but rather to assure their routine prompt payment. If petitioner had not flagrantly violated the

Act over a period of several years and had sought to remedy the situation more promptly, its suppliers would not have to face the risk of petitioner's possible bankruptcy. License revocation will prevent petitioner from repeating its past violations and deter other licensees from similar behavior in the future.

Petitioner's other "relevant factors" are of even less merit. Petitioner's deliberate and consistent disregard of the plain terms of the Act and regulations is not excused by its claims to having been victimized by an alleged embezzlement. As the court of appeals explained, businesses routinely delay paying their creditors due to financial difficulties not of their own making. See Pet. App. 6a. But PACA provides that companies which find themselves in such financial straits may not continue to buy perishable fruits and vegetables and deliberately delay paying for them in order to pay old debts to suppliers.

Petitioner's third "relevant factor" does not logically apply here. Concern about the unintended consequences of a too-harsh sanction was found relevant in the Eighth Circuit cases, where the court of appeals thought that a 90-day suspension would, as a practical matter, simply put the licensee out of business, see *Conforti*, 74 F.3d at 843, and where revocation of the license would require the company's owner, in turn, to disassociate himself from his other PACA licensee, see *ABL*, 25 F.3d at 646. Here, petitioner makes no such argument about an indirect collateral effect. It argues only that revocation of its license will put it out of business and take away the jobs of its employees. Pet. 14. But the Act and its regulations anticipate that the licenses of some dealers will be revoked, and it is within the Secretary's discretion to take that action against

dealers that have repeatedly failed to make timely payments to suppliers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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